



APPENDIX A

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STAY IN TUNE With RESPA

By Sarah Lyons

The Real Estate Settlement Procedures Act (RESPA) celebrates 30 years of consumer protection this year. Section 8, one of the most relevant parts (and with much room for interpretation) covers the prohibition against kickbacks and unearned fees. Some originators may unwittingly be breaking RESPA's laws, ingenuously providing gifts in exchange for customer referrals—an illegal practice. RESPA violations can range from warnings to fines and even jail time, so take the time to familiarize yourself with the particulars of this section.

Section 8 Basics

The statute begins, "No person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person." The message is simple: do not, under any circumstances, give any sort of fee or gift to anyone for referring cus-

tomers. RESPA penalizes originators who give special consideration to anyone, for that matter, customers, who provide referrals or providing referrals.

RESPA guidelines define "thing of value" as any payment, advance, funds, loan, service, or other consideration. This covers a lot of ground. You are prohibited from giving incentives for referrals, and that includes monetary gifts, personal services (such as putting their name on your fliers), and preferential treatment. It also includes creating the illusion of employment to mask referral fees, for example: paying an agent \$100 to stuff envelopes.

Can you still have an end-of-year party for your clients? Of course—

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but be sure that you invite them all, not just those who offer referrals. Can you hold a contest and only enter the names of agents who gave referrals? Absolutely not. This would be a blatant infringement of RESPA. You can, however, send nominal thank-you gifts after a closing. Holiday gifts are also acceptable as long as you send them to all of your customers or agents, and as long as everyone receives the same thing. For example, it would be reasonable to send a box of chocolates to everyone in your database. But, to send them only to those who gave you referrals (or even sending bigger candy boxes) would be a violation.

Shared Advertising

Shared advertising space is a tempting way to reward real estate agents, builders, and financial representatives for adding to your referral base. However, be aware that these actions fall under RESPA's "thing of value" guideline. If you create a flier or rent billboard space, include a business partner on it, and do not charge the other party, you are breaking the law. RESPA states that you are in violation unless each party pays a pro-rata share based upon the cost of the item (as opposed to the value).

Marketing Material

According to RESPA, you are entitled to create promotional materials with your name on them in order to generate new referrals and keep in contact with past clients. Coffee mugs, pens, calendars, notepads—these are all acceptable items. Violations occur when you provide materials with an agent's name for the agent to use in their own business, because this can be a "thing of value" that offsets marketing expenses that they would otherwise incur. Agents may like to receive personalized address labels or pens for their use with customers, but these items are prohibited under RESPA—stick to materials printed with your name exclusively.

Consumer Gifts

The issue of customer referral gifts

FIND OUT MORE...

Where do you go for questions about RESPA? Here are some contacts that will lead you in the right direction.

The RESPA Web site is full of information about recent changes, regulations, FAQs and new HUD recommendations.: <http://www.hud.gov/offices/hsg/stff/res/respahm.cfm>

The American Bar Association Web site offers a lawyer search option that lets you search for lawyers who specialize in real estate law:
www.abanet.org/lawyerlocator/searchlawyer.html

For questions on a specific RESPA violation, contact HUD:

Director, Interstate Land Sales/RESPA Division
Office of Consumer and Regulatory Affairs
U.S. Department of Housing and Urban Development
Room 9146
451 7th Street, SW,
Washington, DC 20410

Look online for books and other materials that will provide more information on RESPA law.

is still slightly unclear. These are reviewed by HUD on a case-by-case basis; it is always better to err on the side of caution. Closing gifts are a fine way to thank a customer for their business. Holiday gifts are generally allowed, as long as they are distributed to all customers, not just those who give you referrals.

Gifts come into question when an originator keeps a database of top referral sources and sends gifts to these consumers in recognition for their referred loans. If you want to acknowledge a referral, send a handwritten thank-you note or a booklet of your favorite recipes—it's personal, thoughtful, and (unlike free basketball tickets) won't get you into any trouble.

Review Process

Nearly 1,000 cases of RESPA violations were investigated in 2003, and that number is expected to rise in 2004. For that reason, RESPA enforcement staff have tripled, and more

attention is being diverted to RESPA violators. In a 2003 announcement, John C. Welcher, HUD Assistant Secretary for Housing and Federal Housing Commissioner stated, "Business practices that are intended to skirt the anti-kickback provisions of RESPA will not be tolerated."

While some complaints filed come from consumers or federal agencies (such as the Federal Trade Commission or Internal Revenue Service), the majority are from competitors.

If you are accused of a RESPA violation, be prepared to prove that the "thing of value" you provided was not contingent on a business exchange. The RESPA Web site offers several guidelines designed to educate you as to what is or is not legal, including an "affiliated business disclosure statement format" outlining referral relationships. Use this information to keep your transactions legitimate. To determine whether

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RESPA VIOLATIONS

They may seem harmless, but the following are just a few examples of what would be illegal if provided as a reward/recognition for referrals:

- Gift certificates for store merchandise
- Paying real estate agents to do tasks such as filling out loan applications online
- Realtor luncheon or open-house lunch
- Fliers with agent's name included (provided without cost to the agent)
- Theater or sporting-event tickets
- An 800 telephone line that an agent can use at no cost
- Items with the agent's name on them
- Appreciation party
- Free virtual-home tours or software
- Travel vouchers
- Wine and cheese basket
- Advertising that promotes the agent
- Golf tournament with dinner and prizes
- Magazine subscription
- Spa day

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your practices are permissible under RESPA, consult an experienced attorney. The American Bar Association can recommend attorneys with a specialty in RESPA law.

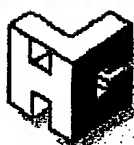
Remember: it takes two to tango. If you are caught violating RESPA, any agents you were involved with will most likely face fines as well. In a recent case in Atlanta, Ga., real estate agents were forced to turn over a total of \$9,200 to customers who were referred to originators in exchange for kickbacks. The originators involved settled their case for \$15,000. Should an agent ever approach you for anything prohibited under RESPA, run the other way and report them. It is possible that they are already breaking the law with someone else.

Once RESPA is apprised of possible infringements, the RESPA enforcement department will review the incident and the circumstances carefully, and act on it appropriately. Warnings, fines of up to \$10,000 per individual, or imprisonment (up to one year) are determined based on many variables, including the number of transgressions and the nature of the business plan. Be aware that individual civil court cases have a one-year statute of limitations.



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